

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

JENNIFER L. KRUEGER

Claimant

VS.

KWIK SHOP, INC.

Self-Insured Respondent

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Docket No. 1,062,995

ORDER

STATEMENT OF THE CASE

Claimant appealed the August 9, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Bryce D. Benedict of Topeka, Kansas, appeared for claimant. Matthew J. Schaefer of Wichita, Kansas, appeared for respondent.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the August 8, 2013, preliminary hearing and exhibits thereto; the transcript of the July 25, 2013, deposition of Dr. Paul Stein and exhibits thereto; and all pleadings contained in the administrative file.

ISSUES

Claimant asserts she injured her low back while working for respondent on July 18, 2012, when she attempted to lift a box of soda pop syrup. Claimant contends that inflammation of tissue or irritation of nerve roots are both changes in the physical structure of the body and merely because they are not visible on an x-ray or MRI does not mean there is no injury. Claimant also alleges that she would have suffered a back injury lifting the syrup even if she did not have a preexisting back condition.

Respondent contends claimant failed to prove she sustained a personal injury by accident arising out of and in the course of her employment as: (1) there was no lesion or change in the physical structure of claimant's body as required by K.S.A. 2012 Supp. 44-508(f)(1); (2) claimant's accident is not compensable solely because it aggravated, accelerated or exacerbated her preexisting condition or rendered it symptomatic; and (3) claimant's accident was not the prevailing factor causing her injury, medical condition or resulting impairment.

The ALJ found claimant's injury non-compensable, stating:

Claimant's preliminary hearing requests are **CONSIDERED** but **DENIED**. Claimant has failed to sustain her burden of proof of personal injury by accident arising out of and in the course of her employment with Respondent.

The competent medical evidence before the court fails to establish that Claimant suffered an injury, a lesion or change in the physical structure of the body as a result of the July 18, 2012 work accident. Even if suspected, but undetected, swelling resulted from the work accident, it only served to trigger or again render symptomatic a pre-existing herniated disc at L3,4. Under the 2011 amendments to the Act [**K.S.A. 2012 Supp. 44-508(f)(2)**], "[a]n injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic."

Here, Claimant had a previous injury to L3,4, with symptoms much like those she has now. Those symptoms had abated prior to the July 18, 2012 work accident, but recurred with that accident. The work accident served to again render symptomatic that pre-existing condition. While there is a causal relationship between the work accident and the recurrence of symptoms, Dr. Stein, the court-ordered neutral examiner, identifies the preexisting condition as the prevailing factor for Claimant's current medical condition. **K.S.A. 2012 Supp. 44-508(f)(2)** controls, and precludes an Award of compensation under these facts.¹

The issue before the Board is: did claimant sustain a personal injury by accident arising out of and in the course of her employment with respondent. Specifically:

1. Did claimant sustain a personal injury? Did she have a lesion or structural change to the body?
2. Did claimant's accident merely aggravate, accelerate or exacerbate her preexisting back condition or render it symptomatic?
3. Was claimant's accident the prevailing factor causing her injury and need for medical treatment?

FINDINGS OF FACT

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds:

¹ ALJ Order at 1.

Claimant testified that on July 18, 2012, she was lifting a box of soda pop syrup weighing 20 to 25 pounds when she felt a pop in her lower back. An ambulance was called and claimant was transported to the hospital emergency room where she was treated. Claimant remained off work a few days and returned to limited duties. Claimant was terminated on September 26, 2012, for having more than \$75 in cash in her cash drawer on three occasions, which was a violation of respondent's policy. Claimant testified that when there was a large number of customers, it was hard to get the money in the safe immediately. She explained at the preliminary hearing that she was over the cash level because she was taking medication for her injury. She indicated her co-workers also violated this policy and that her cash drawer was audited more frequently after her accident. On cross-examination, claimant confirmed that she had been given verbal warnings and had been written up for not wearing her name tag and wearing a tongue ring, in violation of respondent's policies. Claimant indicated she was not receiving medical treatment because she could not afford it, as she had no job and no health insurance.

In 2009, claimant sustained a work-related low back injury and was treated with epidural injections, physical therapy and a TENS unit. Claimant's treating physician was Dr. James M. Mahalek and she received a workers compensation settlement. Claimant continued to use the TENS unit periodically after being released by Dr. Mahalek. Claimant testified she felt great after being released by Dr. Mahalek in January 2010. In August 2010, because claimant's back became painful because she worked at a job that required sitting eight hours a day, claimant requested a refill of Robaxin, an anti-inflammatory medication, from Dr. Jeffery W. McKinley.

On July 23, 2012, claimant saw physician's assistant Cassandra L. Montoya. X-rays taken revealed no fractures. Claimant reported lumbar pain that radiated into both hips and legs, with the symptoms more significant in the left hip and leg. Ms. Montoya again saw claimant on August 31, 2012. Her notes indicated claimant underwent an MRI that revealed disc protrusions at L3-4, L4-5 and L5-S1. Notes from the August 31 visit, cosigned by Ms. Montoya and Dr. Josh Durham, indicated they wanted to obtain claimant's MRI that was taken after her previous injury. Ms. Montoya was apparently supervised by Dr. Josh Durham.

Heather Nicholas, a district advisor in charge of eight of respondent's stores, including the one where claimant was employed, verified claimant was discharged on September 26, 2012, for having too much cash in her drawer. Ms. Nicholas testified that on the date claimant was terminated, she had a tongue ring in and no name tag, both violations of respondent's policies. On cross-examination, Ms. Nicholas acknowledged that the verbal warnings she gave claimant about having cash in excess of \$75 were not documented. Ms. Nicholas indicated that respondent could have accommodated claimant's restrictions given by Dr. Paul S. Stein.

At the preliminary hearing, the January 28, 2010, notes of Dr. Mahalek and the August 3, 2010, notes of Julie Siefers, Dr. McKinley's physician's assistant, were

introduced. Dr. Mahalek diagnosed claimant with low back pain, lumbar degenerative disc disease, lumbar herniated disc and lumbar radiculopathy, improved. He released her to return to work on January 28, 2010. The notes from Dr. McKinley's office indicated claimant had low back pain.

Claimant was evaluated by three physicians: Dr. Paul S. Stein by order of the ALJ, Dr. John P. Estivo at the request of respondent's attorney, and Dr. Edward J. Prostin at the request of claimant's attorney. Dr. Estivo saw claimant on October 19, 2012. He noted that claimant underwent an MRI on August 17, 2009, that showed degenerative bulging discs at L3-4, L4-5 and L5-S1. Dr. Estivo also indicated that Dr. Mahalek determined claimant had a 7% whole body functional impairment based upon the *AMA Guides to the Evaluation of Permanent Impairment* (6th ed.). Dr. Estivo stated:

In my opinion, this patient has had an aggravation of a preexisting chronic lumbar spine condition when she lifted the syrup at Kwik Shop on 07/18/2012. The prevailing factor regarding this patient's lumbar spine complaints would be the preexisting degenerative disk disease to the lumbar spine which was expected to give her flare-ups in the future. The prevailing factor for her lumbar spine pain is not the incident of 07/18/2012. She does not require any further medical treatment in relation to the incident of 07/18/2012. There is no impairment in relation to the incident of 07/18/2012. She does not require any work restrictions in relation to the incident of 07/18/2012.²

Dr. Prostin saw claimant on December 18, 2012, and indicated the August 10, 2012, MRI revealed a herniation of the disc asymmetric to the right at L4-5. He opined:

On or about July 18, 2012, Jennifer L. Krueger sustained injury to her low back during the course of her employment. She has [a] herniated disc with radiculopathy. She would likely be benefited by epidural steroid injections. She appears quite nervous today and would likely be benefited by anti-depressant medicines and a gentle exercise program as well. Presently, she is able to return to only light duty employment with avoidance of more than minimal bending or twisting at the waist or captive positioning. The work-related accident sustained on or about July 18, 2012 is the prevailing factor in causing the injury, the medical condition and the need for medical treatment.³

In his initial report dated April 18, 2013, Dr. Stein opined claimant had an acute aggravation of lower back degenerative disc disease and that her accident was the prevailing factor causing her symptomatology. However, he thought it would be helpful to examine the MRI taken after her 2009 injury and compare it to her August 2012 MRI. Dr. Stein testified that he had no evidence that prior to claimant's July 18, 2012, accident,

² P.H. Trans., Resp. Ex. H at 4.

³ *Id.*, Cl. Ex. 7 at 2-3.

she had any limitation in her physical abilities or was experiencing symptomatology since 2010. Dr. Stein opined claimant's 2012 accident was the triggering or precipitating factor causing the aggravation of her preexisting condition.

After reviewing and comparing claimant's 2009 and 2012 MRI films, Dr. Stein issued a second report on May 25, 2013, noting there was little difference in the MRIs. Dr. Stein testified he could not find a structural change in claimant's lower back. He stated:

Comparing the imaging studies of August, 2009, to the radiology report as well as my reading of the August, 2012, MRI scan, I do not see a significant difference. I cannot state within a reasonable degree of medical probability that there has been a change in physical structure of her back, or any new lesion, seen on MRI scan. On that basis, the current condition most likely represents a symptomatic aggravation of her previous condition. Having had the opportunity to make this review, there is some alteration of the opinion stated in my report of 4/18/13, Page 6, section 1. While I still believe there is a relationship between the work incident on 7/18/12 and the current symptoms by virtue of aggravation of the preexisting condition, I cannot state that the work incident was the primary or prevailing factor.⁴

Dr. Stein testified the statement in his report was wishy-washy and that it was his opinion that the work incident was an aggravation of claimant's previous condition.

PRINCIPLES OF LAW AND ANALYSIS

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁵ "Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act."⁶

K.S.A. 2012 Supp. 44-508 states in part:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

⁴ Stein Depo., Ex. 2.

⁵ K.S.A. 2012 Supp. 44-501b(c).

⁶ K.S.A. 2012 Supp. 44-508(h).

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

. . .

(g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

This Board Member finds that Dr. Prostic's prevailing factor opinion has little merit. Dr. Prostic provided no reasoning why claimant's accident was the prevailing factor causing her injury and need for medical treatment. His report indicated claimant's 2012 MRI revealed a bulging disc at L4-5, but does not specifically mention the bulging discs at L3-4 or L5-S1.

Dr. Stein reviewed claimant's 2009 and 2012 MRI films and found little difference in claimant's back condition. Dr. Estivo indicated claimant's 2009 MRI revealed degenerative bulging discs at L3-4, L4-5 and L5-S1. He noted the same degenerative protruding discs are seen on her 2012 MRI. Drs. Stein and Estivo opined claimant aggravated a preexisting condition. Dr. Stein indicated there was no evidence of a change in physical structure or a new lesion. Dr. Estivo opined claimant's accident was not the prevailing factor causing her injury and that she did not require any further medical treatment in relation to her accident.

Simply put, claimant failed to prove that she sustained a change in physical structure or a new lesion or that her accident was the prevailing factor causing her injury and need for medical treatment. Claimant's accident merely triggered her preexisting back condition. Therefore, claimant did not prove she sustained a personal injury by accident arising out of and in the course of her employment with respondent.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.⁷ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁸

WHEREFORE, the undersigned Board Member affirms the August 9, 2013, preliminary hearing Order entered by ALJ Moore.

IT IS SO ORDERED.

Dated this ____ day of October, 2013.

HONORABLE THOMAS D. ARNHOLD
BOARD MEMBER

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Honorable Bruce E. Moore, Administrative Law Judge

⁷ K.S.A. 2012 Supp. 44-534a.

⁸ K.S.A. 2012 Supp. 44-555c(k).